LIM CHEW YIN A

v.

DATO' SUHAIMI IBRAHIM & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
PRASAD SANDOSHAM ABRAHAM JC
[SUIT NO: S-22-1401-2007]
2 FEBRUARY 2011

TRUSTS: *Trustees - Breach of trust - Construction of trust deed - 1st defendant holding shares in trust of plaintiff - Shares transferred to third parties without consent of cestui cue trust - Whether 1st defendant liable - Whether third parties equally liable* C

The 1st defendant in this case had purchased some 120,000 shares in the 2nd defendant company, and became the registered owner of the shares, through funds allegedly made available to him by the plaintiff. Arising thereof, a trust deed was executed whereby the 1st defendant agreed to hold the said shares in trust for the plaintiff. The trust deed aside, the 1st defendant had also pre-signed the relevant transfer form and further deposited the original share certificate with the plaintiff. Subsequently, however, the 1st defendant, without the plaintiff's consent or knowledge, transferred 80,000 of the said shares to the 3rd and 4th defendants. The plaintiff alleged that the 1st defendant had unlawfully transacted in the shares, or wrongly transferred the shares, and in the circumstances instituted the civil action herein claiming relief against all the four defendants. The 1st defendant denied to executing the trust deed, and in any case suggested that the deed could have been inadvertently or unintentionally signed by him. That being so, before the learned Judicial Commissioner, a question arose as to whether a valid declaration of trust was created over the said shares by the trust deed in favour of the plaintiff – and if so – as to the effect of such trust on the second defendant company and the 3rd and 4th defendants respectively. D E F G H

Held (for the plaintiff; ordering damages to be assessed):

(1) There was nothing uncertain about the subject matter of the trust and its object. Hence, a trust was created over the said shares by virtue of the trust deed dated 17 March 1997 wherein the 1st defendant is the trustee for the shares and holding same for the benefit of the plaintiff *cestui que trust*. (paras 11-13) I

(2) As between the plaintiff and the 1st defendant, there can be no doubt as to the validity of the agreement and their respective rights *in personam*. The plaintiff can exercise her rights against the 1st defendant for breaching the agreement since the said shares have been wrongfully transferred to the 3rd and 4th defendants. (para 15)

(3) The 2nd defendant is not bound in law to recognize the plaintiff's interest in the said 80,000 shares transferred and should have never been made a party to this suit. Likewise, the 3rd and 4th defendants had acted purely on the directions of the 1st defendant and had no direct notice of the trust. Consequently, the claim against the 2nd, 3rd and 4th defendants ought to be dismissed. (para 17)

Case(s) referred to:

Pua Kim Seng v. Mohamad Khashim Abdul Sakor & Anor [2010] 1 LNS 29 CA ***(refd)***

Teh Poh Wah v. Seremban Securities Sdn Bhd [1996] 4 CLJ 16 CA ***(refd)***

The Societe Generale De Paris And Another v. The Tramways Union Company, Limited, And Others [1884] 14 QBD 424 ***(refd)***

Yap Joyce v. Tee Molly & Anor [2000] 6 CLJ 220 HC ***(foll)***

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 163

Evidence Act 1950, s. 114(g)

For the plaintiff - David Matthew (Michele Kaur with him); M/s Jayan & Assocs

For the defendant - K Harikrishnan (R Jayasingam with him); M/s BH Lawrence & Co

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Prasad Sandosham Abraham JC:

[1] The trial of this matter was concluded after several days of hearing and the court delivered its judgment on 3 December 2010 wherein I made the following orders ie:

(1) Judgment for the plaintiff in terms of prayer 13(a) of the statement of claim with costs,

(2) Damages against the 1st defendant to be assessed by the Timbalan Pendaftar of High Court,

(3) the claim against the 2nd , 3rd & 4th defendant is dismissed with costs

[2] An appeal has been lodged against my decision and I now furnish my grounds for so deciding.

Facts Of The Case

[3] The whole dispute revolves around a block of shares ie, 120,000 shares in the 2nd defendant (the said shares). At the material time the 1st defendant was the registered owner of the said shares ie, 17 March 1997. The shares certificate for the said shares bears share Certificate No. 008 (the Original Certificate). At first glance one would ask why this would develop into a full blown dispute seeing the 2nd defendant is a private limited company, however the 2nd defendant was at the material time a member of a consortium of companies in a consortium known as Konsortium Lapangan Terjaya the concession owner for a project known as the Maju Expressway also known as the KL - Putrajaya - KLIA Dedicated Highway, (the said project) a Highway used by many for trips to the Palace of Justice and or the Kuala Lumpur International Airport, hence the significance of the said shares in the 2nd defendant. Eventually the 2nd defendant was excluded from the said consortium and that is the subject matter of a different suit which has no bearing to the issues before this case. The 1st defendant eventually transferred 80,000 of the said shares to the 3rd & 4th defendants in equal shares a fact not in dispute save as to its legality. The said shares had at material times a new shares certificate issued for it on the basis the original certificate was lost (pp. 55 lines 1-24 notes of proceedings). The plaintiff disputes this.

Issues To Be Determined In This Case

[4] The plaintiff contends that at the material time, the 1st defendant held the said shares, *albeit* being the Registered Owner of the same as trustee for the plaintiff, 1st defendant's *cestuis que* trust in respect of the said shares. The plaintiff relies on the following evidence to assert this relationship of trust.

[5] The plaintiff contends in her evidence in chief that the 1st defendant acquired the shares through funds that were made available by the plaintiff which the plaintiff did by means of cash. The trust deed dated 17 March 1997 was executed by the 1st defendant and the said document was duly stamped and a copy of the same was kept by the plaintiff. (see P1 in bundle B at p. 12-16). The 1st defendant had further deposited with the plaintiff a pre signed Form 32A and the original share Certificate No. 008 for the said shares which the plaintiff still holds.

[6] When the plaintiff found out that the 1st defendant had dealt with the said shares without her consent, according to her testimony she tried to arrange for a meeting with the 1st defendant and when she met him on 26 July 2006 the plaintiff served the 1st defendant with a letter of demand dated 26 July 2006 marked P3 (see bundle B at p. 18) which the 1st defendant refused to acknowledge.

[7] The 1st defendant raises several issues that the 1st defendant says clearly negates a presumption of trust over the said shares arising. The first defendant does not deny the said trust deed but denies executing it on 17 March 1997. To support that, the evidence of DW2 was tendered in court. DW2 is a Scientific Officer, Jabatan Kimia and in his evidence found on p. 2 to p. 13 of the notes of proceedings for Tuesday 28 September 2010, and the evidence clearly shows that DW2 is unable to corroborate whether the 1st defendant had signed the said trust deed on 17 March 1997 as the Jabatan Kimia had no facilities for age testing. Further his testimony does not clearly establish that the 1st defendant had not signed the said trust deed.

[8] The 1st defendant also testified that he had signed a lot of purportedly blank documents for one Mr. Soo Tian Chia in various companies where he had served as a director as the 1st defendant explained that his time was taken up by politics and "lobbying" and the affairs of the various companies had to proceed unimpeded. So the allegation is the said trust deed could have been signed either in blank or in a pile of documents which the 1st defendant had no intention of signing (see p. 48 transcript of evidence para 6 to 14). This argument does not find favour with the court and I accept the proposition of law in the case referred to me by counsel for the plaintiff in the decision of the

Court of Appeal *Teh Poh Wah v. Seremban Securities Sdn Bhd* [1996] 4 CLJ 16; [1996] 4 MLJ 701 wherein at p. 702 of the report in the leading judgment of His Lordship Gopal Sri Ram JCA and I quote:

> (2) This appeal could be resolved by reference to the doctrine of estoppels. The appellant, by her actings, would have led a reasonable man to believe that she had given her husband *carte blanche* to act on her behalf. It could further be inferred from the undisputed facts that the respondents were influenced by the conduct of the appellant to entertain such a belief. Pursuant to the doctrine, the appellant could not now assert facts that would contradict her earlier conduct as that would be inequitable and unjust. She must face the consequences of the series of events which she set in motion by acceding to the husband's plan.

[9] The 1st defendant also alleges that the 1st defendant signed these blanks documents for one Soo Tian Chai who is now using the same against the defendants. Mr. Soo Tian Chai was not called to give evidence and be subject to cross examination and therefore this allegation of the defendants remains at best an allegation. This would also apply to the contention of the 1st defendant that the plaintiff was merely a nominee of the said Soo Tian Chai and the suit was being brought at his behest. I reject this contention as well as Soo Tian Chai was not called to testify and invoking s. 114(g) of the Evidence Act, the court rejects this argument of the defendants.

[10] The plaintiff has explained in her Evidence in Chief why the trust over the said shares was created and any argument to raise the issue of circumvention of the Bumiputra policy of the Government cannot be considered by this court as it was never pleaded and at any rate the companies participating in the concession owner had more than 30% Bumiputra content.

[11] Having evaluated the evidence and considered the arguments raised I find that there was a valid declaration of trust over the said shares created in favour of the plaintiff for the following reasons:

(a) The trust deed 17 March 1997 and its terms clearly express the said trust. The document I find as a fact is not a forgery and DW1 signed the said document on the aforesaid date as there is no credible evidence to suggest otherwise

A (b) The signing of the blank transfer of shares, the original shares certificate of the said shares and the appropriate resolutions all being deposited with the plaintiff are all conduct of the trust being in existence

B (c) The 1st defendant's attempts to justify the transfer of 80,000 of the said shares to the 3rd & the 4th defendants through the use of a new share certificate for the said shares on the basis Certificate 008 was lost to my mind appears to be unconvincing. What is most telling is that Certificate No. 008 C was reported lost to the Co Secretary of the 2nd defendant at that time on 25 January 2003 whereas exh. D8 & D9 ie, the two share transfer forms transferring 80,000 of the said shares originally contained in share Certificate No. 008 to the 3rd & 4th defendant is dated 23 January 2003. The Company D Secretary of 2nd defendant was not called to testify.

(d) DW1 admits that the plaintiff was involved in the concession project through the main contractor for the same Mancon Sdn Bhd for whom the plaintiff worked. The plaintiff also had a relationship with Mr. Soo Tian Tai and the plaintiff was also E a Director of Anson Sdn Bhd. The plaintiff was very much involved in the project and the 1st defendant was well aware of this fact. The principal Soo Tian Tai who could have easily testified as to the relationship between the parties was not F called to testify so there is merit to the contention that she was offered an opportunity to purchase the said shares through the 1st defendant.

(e) I believe the testimony of PW1 remained essentially unchallenged in cross examination.

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[12] The court finds there was a trust created over the said shares by virtue of the trust deed dated 17 March 1997 wherein the 1st defendant is the trustee for the said shares held for the benefit of the plaintiff and the subject matter of trust and its H objects remain certain. The court refers to the *Yap Joyce v. Tee Molly & Anor* [2000] 6 CLJ 220; [2000] 3 MLJ 599 where the learned judge Kamalanathan Ratnam J held at pp. 599 to 600 of the report.

I (1) The trust deed created by the donor was an express trust providing for a life interest for the donor and upon her death the second defendant was entitled to the property. It was not necessary for the court to look for extrinsic evidence to see if there was a trust created in this case ...

(2) There was nothing uncertain about the trust deed nor was there any ambiguity with regard to the intention to create a trust. The trust deed being a trust created over real property and in writing had complied with the three certainties of a trust, namely certainty of the subject matter to be held on trust, certainty of the object and certainty of the words creating the trust.

[13] Having found a relationship of trust existing between the 1st defendant as a trustee and the plaintiff as a *cestuis que* trust, counsel for the plaintiff urges the court to exercise its power in its equitable jurisdiction to grant an order in terms of prayer (c) & (d) of the plaintiff's statement of claim. However this would have the effect in law of causing the 2nd defendant to recognize the relationship of trust that existed between the 1st defendant as the Registered Shareholder of the 4th defendant and the plaintiff as the beneficial owner of the shares. Abdoolcader J (as he then was) in the Federal Court case of *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ at p 240 NB pg 242 citing a useful passage from the judgment of Coleridge CJ in *Re Perkins ex-parte Mexican Santa Barbara Mining Co* and I quote:

In the first place, it seems to me extremely important not to throw any doubt on the principle that companies have nothing whatever to do with the relation between trustees and their *cestuis que* trust in respect of the shares of the company. If a trustee is on the company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the company have nothing whatever to do; they can look only to the man whose name is upon the register.

(See also s. 163 of the Company Act 1965) and see also the Articles of Association of the 2nd defendant ie, arts. 17 bundle C p. 479 which states:

Expert as required by law, no person shall be recognized by the Company as holding any share upon any trust, and the Company shall not be bound by or compelled in any way to recognize any equitable, contingent, future or partial interest in any share, or any interest in any fractional part of a share, or (except only as by these presents, or by law otherwise provided) any other right in respect of any share, except an absolute right to the entirety thereof in the registered holder.

[14] The Court of Appeal in its recent decision of *Pua Kim Seng v. Mohamad Khashim bin Abdul Sakor & Anor* [2010] 1 LNS 29; [2010] 5 MLJ p 791 held:

> The learned trial judge erred in law in holding that the trust deed was unenforceable in view of article 6 of the articles of association of the second respondent company. Further, the learned trial judge failed to appreciate the significance and distinguish the effect of that article on the second respondent company as compared with the first respondent. Article 6 did not affect the validity of the trust deed as the second respondent was not a party to the trust deed and hence was not bound by the agreement made between the appellant and the first respondent. Article 6 merely provides protection to the second respondent company so that it would not be bound or required in any way to recognize any equitable, contingent, future or partial inters in the trust shares. As between the appellant and the first respondent the agreement or trust could be enforced.

See the judgment of his Lordship Hassan Lah JCA at p. 799 para 18 and I quote:

> A company does not take cognizance of trusts except in so far as is provided in s 163 of the Companies Act 1965 which should be read in conjunction with its articles of association which usually go beyond the statutory provision by stating that the company shall not be bound to recognize any equitable interest or any other right in a share except an absolute right in the registered holder. This goes beyond s. 163 in so far as it relates not merely to the question of registration of the membership right but generally to the recognition of trusts in connection with shares. Now article 10 of the appellant's articles of association which goes beyond the provisions of s. 163(4) of the Companies Act expressly stipulates that except as required by law, no person shall be recognized by it as holding any share upon any trust, and it shall not be bound by or be compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share or unit of a share or (except only by its articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirely thereof in the registered holder. The *cestui que* trust of shares in a company cannot be made liable either as a shareholder or as a contributory for there is no privity of contract between him and the company.

[15] What then is the effect of the declaration of trust that the court has found in favour of the plaintiff. As between the plaintiff and the 1st defendant there can be no doubt as to the validity of the agreement and their respective rights in personam. The plaintiff can exercise her rights against the 1st defendant for breaching the agreement since the said shares have been transferred *albeit* wrongfully to the 3rd & 4th defendants. The Court of Appeal was of the same view in the aforesaid case referred to earlier where it held whilst the trust deed was valid as between the 1st defendant and the plaintiff, it could not be enforced against the 2nd defendant.

An example of the rights of the plaintiff against the 1st defendant in equity was illustrated in the decision of the Court of Appeal in the judgment of *The Societe Generale De Paris And Another v. The Tramways Union Company, Limited, And Others* [1884] 14 QBD 424 and I quote:

> If a shareholder in a company governed by the Companies Act 1862 does not transfer his shares, but agrees to transfer them or to hold them upon trust for another, either absolutely or by way of security, *there can be no doubt as to the validity of the agreement, nor as to the effect of it as between the parties to it. As between them the agreement or trust can be enforced; but as regards the company the shareholder on the register remains shareholder still.* He is the person to exercise the rights of a shareholder-for example, to vote as such, to receive dividends as such, and to transfer the shares. On the other hand, he and he alone, is liable for calls and to be put on the list of contributories if the company is wound up. The person having the beneficial interest in the shares has, as against the company, no right to them; he has as against the company no right to have them registered in his own name. But it is necessary to consider another matter, *viz*, the effect of a notice given to a company by a *cestui que* trust or equitable mortgagee of shares in it, and in particular it is necessary to consider whether after such a notice the company can properly decline to permit the registration of a transfer by the registered holder of the shares. It is obvious that the question is one of the utmost importance not only to equitable owner and mortgagees of shares, but also to companies; for whilst on the one hand, if the notice is valueless, an equitable owner or mortgagee will be at the mercy of the registered owner, yet on the other, if the notice operates as a stop on the transfer of the shares, companies must be careful to preserve such notices and not to disregard them.

A The decision was affirmed by the House of Lords.

[16] In our case it is an undisputed fact that notice of the said trust was not rendered to the 2nd defendant.

B **[17]** The court also dismissed the suit against the 2nd defendant with costs as the 2nd defendant should have never been made a party to this suit. I accordingly dismissed the claim against the 2nd, 4th & 5th defendants with costs. As the 4th & 5th defendants acted purely on the directions of the 1st defendant and no evidence has been shown of their direct involvement in breach C of the said agreement of trust as distinct from their involvement in the project. At any rate even if 2nd defendant is not bound in law to recognise the plaintiff's interest in the said 80,000 shares transferred, the trust *in personam* would fasten on to the said shares. There is no evidence to suggest that the 4th & 5th D defendants had direct notice of the trust.

[18] For the aforesaid reasons I ordered accordingly.

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